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80-1086

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DONALD WYRICK, Warden,
Missouri State Penitentiary,
Petitioner,

v.

JOHN DALE HENSON,
Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN ASHCROFT
Attorney General

PAUL ROBERT OTTO
Assistant Attorney General

Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

MICHAEL ELBEIN
Assistant Attorney General
of Counsel

KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri Dial 314/449-4163

QUESTIONS PRESENTED

1. Whether the respondent had contemporaneously objected in the state court to the jury panel on the ground that the bystanders were chosen by the sheriff when the respondent's objection at trial was on other grounds and the state appellate court, in affirming the respondent's conviction, indicated that it could not rule on the question of whom chose the bystanders because these was no evidence in the record on which to make a decision on the merits?

2. Whether the Court of Appeals' decision in *Henson* v. *Wyrick,* No. 79-1808, that the respondent is entitled to a new trial because the sheriff, who did not testify or investigate this case, chose the bystander vernireman pursuant to an order given under the authority of a state statute (§ 494.250(2), RSMo), when the issue in the District Court and in the respondent's appellate brief was that the deputy sheriffs who testified against the respondent chose the bystander veniremen, is in conflict with the established rule that only those issues presented in the district court can be raised on appeal?

3. Whether respondent is entitled to a new trial, without a showing of actual prejudice, solely on the ground that the sheriff's choosing the bystanders, pursuant to state statute, is inherently prejudicial?

4. Whether the Court of Appeals' action, in remanding this cause for a hearing, and deciding said cause, after the hearing, without the magistrate who conducted the hearing proposing Findings of Fact and Conclusions of Law, and without an opinion by the district court, was apart from the accepted and usual course of proceedings as required by Rule 8 fol. 28 U.S.C. § 2254?

5. Whether the Court of Appeals, in remanding this cause for a hearing and placing the burden of proof upon

the petitioner, acted apart from the accepted and usual course of proceedings, since 28 U.S.C. § 2254(d), *Walker* v. *Johnston,* 312 U.S. 275, 286, 61 S.Ct. 574, 85 L.Ed.2d 830 (1941); and *Johnson* v. *Zerbst,* 304 U.S. 458, 469, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), indicate that it is the applicant for a petition for a writ of *habeas corpus* who carries the burden of proof.

PARTIES

In the United States District Court for the Eastern District of Missouri and the United States District Court of Appeals for the Eighth Circuit, the parties were: John Dale Henson, petitioner-appellant, and Donald W. Wyrick, Warden, Missouri State Penitentiary, respondent-appellee.

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OCTOBER TERM, 1980

DONALD WYRICK, Warden,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI

The petitioner, Donald W. Wyrick, respectfully requests that a writ of certiorari issue to review the Judgement of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Opinion and prior Order of the United States Court of Appeals for the Eighth Circuit, as yet unreported, is styled and numbered as follows: *John Dale Henson, Appellant,*[1] v. *Donald Wyrick, Warden, Missouri State Peni-*

[1]Hereinafter referred to as: Respondent.
[2]Hereinafter referred to as: Petitioner.

tentiary, Appellee,[2] No. 79-1808, in the United States Court of Appeals for the Eighth Circuit. The final Opinion of the Court of Appeals is dated November 12, 1980. The previous Order remanding this cause for a hearing is dated April 29, 1980. Copies of the Opinion and Order are reprinted as Appendix A.

The Orders of the United States District Court for the Eastern District of Missouri in the case of *John Dale Henson, etc., Petitioner* v. *Donald Wyrick, Warden, Respondent,* Case No. 78-970 C (3), are not reported. The Review and Recommendation of the United States Magistrate is dated April 20, 1979. The Order of the United States District Court for the Eastern District of Missouri, adopting said Review and Recommendation, is dated September 6, 1979. The Order of the United States District Court for the Eastern District of Missouri, on remand from the United States Court of Appeals for the Eighth Circuit, ordering that the case be referred to the United States Magistrate, is dated April 30, 1980. Copies of the Orders of the United States District Court and of the United States Magistrate's Review and Recommendation are reprinted as Appendix B.

The direct appeal of the respondent to the Missouri Court of Appeals, Springfield District, is reported at 552 S.W.2d 378 (Mo.App., Spr. D. 1977). The reported decision on the petitioner's appeal from the denial of his state post-conviction motion, is entitled *Henson* v. *State,* 581 S.W.2d 595 (Mo.App., S.D. 1979). Copies of these opinions are reprinted as Appendix C.

JURISDICTION

The final judgment of the United States Court of Appeals for the Eighth Circuit was filed on November 12, 1980. Pursuant to a motion to stay, filed by the petitioner, the Court of Appeals stayed its Mandate until January 2,

1981, and, if a petition for a writ of certiorari is filed by that date, the Mandate will be stayed until disposition of the case by this Court.

The present petition is filed within sixty (60) days after the entry of Judgment in this case, and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment, reads as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Fourteenth Amendment, reads as follows:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers,

counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any state, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 494.250, RSMo 1969, reads as follows:

494.250. Clerk to draw names—sheriff to summon jury, when.—1. The clerk of the board of jury commissioners, so situated as to be unable to see the names on the slips, shall proceed publicly, in the presence of the board of jury commissioners, to draw out names separately and singly from one township until he gets the number of names required from such township for petit jurors and an equal number as alternate jurors to serve on petit juries if summoned. In the same manner he shall continue to draw names from each of the remaining townships, separately and singly, until he has drawn the names of twenty-four persons who shall serve as petit jurors at the next ensuing term of court for which petit jurors are drawn, and the names of twenty-four persons to be designated as alternate petit jurors, the names of said alternate petit jurors to be recorded and numbered consecutively from one to twenty-four, inclusive, in the order in which they are drawn.

2. In all cases where the board of jury commissioners fails to select jurors and alternates, as required by law, the sheriff of the county shall summon petit jurors from the several townships in the county, according to their respective populations, as nearly as may be, not less than ten days before the first day of the term of the court for which the jurors are summoned; and the sheriff when ordered by the court demanding a jury shall summon petit jurors during the term from the bystanders, after the list of alternate petit jurors has been exhausted. No person shall be summoned as a standing juror twice within the period of one year in any court of record.

STATEMENT OF THE CASE

This petition is brought as a result of the United States Court of Appeals for the Eighth Circuit's Opinion holding that the petitioner was entitled to a new trial or release

from custody, because the manner in which the bystander veniremen were chosen violated the due process clause and the petitioner's right to a trial by jury. The history of this case is as follows:

Respondent was convicted, after a trial by jury, of murder in the second degree. Following voir dire, the respondent's counsel objected to the jury panel because it allegedly did not comply with the statutory provisions for selecting a jury, his specific grounds being that the special judge then presiding had not been the judge who excused some members of the regular panel, and that the regular panel had not been fully exhausted before the bystanders were chosen. After a pre-trial hearing at which the Circuit Clerk testified that the regular judge (who had been rescued in the respondent's case) had excused some members of the regular panel for the entire term of court. The Special Judge then excused four more members of the regular panel and overruled the respondent's motion. The jury panel consisted of nineteen regular panel members and fourteen standby veniremen.

On direct appeal to the Missouri Court of Appeals, the respondent alleged that he was entitled to a new trial on the grounds objected to in the trial court and, in addition, because the standby jurors were chosen by deputy sheriffs who had testified for the state. In affirming the respondent's conviction, the Missouri Court of Appeals stated that the regular veniremen had been properly excused before the bystanders were chosen. In relation to the respondent's contention on appeal that the deputies who testified had chosen the bystanders, the Missouri Court of Appeals stated:

> "Defendant's third point is that the trial court erred 'in refusing to grant defendant's motion to quash the jury panel in that fourteen members of said panel were selected by deputy sheriffs who were witnesses for the state and against the defendant.'

> "A sufficient answer to this point is that it has no factual support. The record does show that two deputies testified for the state. Defendant's brief says that 'they were also involved in the summoning of the fourteen bystanders who made up part of the jury panel.' The transcript contains no basis for that remark." *State* v. *Henson* 552 S.W.2d 378, at 382 (Mo. App., Spr.D. 1977).

The respondent then filed a state post-conviction motion, pursuant to Missouri Supreme Court Rule 27.26. At the trial court level, the respondent contended that deputies who testified against him chose the bystanders. At the hearing on said post-conviction motion, the only evidence presented by the respondent pursuant to that allegation was the testimony of Deputy Kimbrow, who testified that he did not participate in the choosing of the bystander veniremen. This issue was not raised on appeal from the denial of the post-conviction motion. *Henson* v. *State,* 581 S.W.2d 595 (Mo.App., 1979). While the respondent's state post-conviction motion was pending on appeal, he filed an application for a writ of *habeas corpus* in the United States District Court for the Eastern District of Missouri, pursuant to 28 U.S.C. § 2254, seeking release on bond while the state appeal was pending. Respondent then amended his petition to include, among others, the ground that deputy sheriffs who testified chose the bystander veniremen. Following the Missouri Court of Appeals decision in *Henson* v. *State, supra,* the United States District Court for the Eastern District of Missouri, adopting the Review and Recommendation of the United States Magistrate, denied the respondent's Petition for a Writ of Habeas Corpus without a hearing.

The respondent was granted a certificate of probable cause and in his brief on appeal he again alleged that he was entitled to *habeas corpus* relief because deputy sheriffs

who had testified in his trial chose the bystander veniremen. After oral argument, the United States Court of Appeals for the Eighth Circuit remanded the cause to the district court for an evidentiary hearing to determine how the bystanders had been chosen. The District Court referred the proceeding to the United States Magistrate for the hearing, and, after said hearing, the United States Court of Appeals, without the magistrate first having filing Findings of Fact and Conclusions of Law, issued its opinion holding that the sheriff's choosing the bystander veniremen, pursuant to § 494.250(2), RSMo, violated the respondent's right to a trial by jury and due process. The Eighth Circuit Court of Appeals specifically found that a timely objection in the state trial had been made, that the sheriff had chosen people with whom he was acquainted, and that an actual showing of prejudice was unnecessary since there was a potential prejudice in having the officer, whose subordinates investigated the case, choose the bystanders.

It is from this latest opinion of the United States Court of Appeals, Eighth Circuit, that the petitioner seeks this Court's review.

REASONS FOR GRANTING THE WRIT

The petitioner submits that a Writ of Certiorari should issue because the proceedings in the United States Court of Appeals for the Eighth Circuit in *Henson* v. *Wyrick* were apart from the accepted and usual course of the proceedings; and because the final opinion in *Henson* v. *Wyrick* Cause No. 79-1808 (November 12, 1980) was apart from the accepted and usual course of proceedings, is in conflict with previous decisions of this court and is in conflict with the decision of the highest state court of Missouri, in *State* v. *Eugene Holt,* 592 S.W.2d 759 (Mo. banc 1980).

CONTEMPORANEOUS OBJECTION

Petitioner suggests that the Court of Appeals' holding, that the respondent did not deliberately bypass his available state remedies by failing to contemporaneously object to, and present evidence in support of, his allegation that the deputy sheriffs who testified against him chose the bystander veniremen, is in conflict with the decision in *Wainwright* v. *Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In *Wainwright, supra,* the objection at trial to the admissibility of the defendant's previous statements to the police was on the ground that the basic elements of the offense had not yet been established at the time those statements were made. On appeal, the defendant raised the issue that the statements were inadmissible because of his failure to understand the *Miranda* warnings. The state appellate court did not review this ground because of the failure of the plaintiff to contemporaneously object at trial. This Court held that the applicant could not raise that issue in a petition for a writ of *habeas corpus* because he had deliberately bypassed the available state procedures and had made no showing of cause and prejudice for so doing.

In the case at bar, following voir dire, the only objection to the jury was on the grounds that the special judge presiding over the respondent's trial had not been the judge who had excused the regular panel members (it had been the regular judge who had excused them for the term); and that the regular panel had not been fully exhausted because four members who were eventually excused had not been excused prior to the order for the bystander veniremen being issued. On appeal to the state appellate court, the respondent alleged that he had been denied due process because the bystander veniremen had been chose by deputy sheriffs who had testified on behalf of the State at trial.

The Missouri Court of Appeals, in affirming respondent's conviction, indicated that it could not rule on the merits of this contention because the respondent, at the pre-trial hearing on a motion to quash the jury panel, presented no evidence that it was these deputies who had chosen the bystanders. The reason that there was no evidence presented at this hearing is obvious. The respondent had made no objection, at that time, to the jury panel on the grounds that the bystanders had been chosen by deputy sheriffs who testified for the state. The Eighth Circuit interpreted the Missouri Court of Appeals' opinion as recognizing that the respondent preserved his objection at trial. The petitioner contends that the Missouri Court of Appeals did nothing more than indicate that they could not reach the merits because the respondent had presented no evidence at the pre-trial hearing on the motion to quash the jury panel. This motion, of course, was held after the respondent objected to the jury panel on grounds other than those raised in his Application for a Writ of Habeas Corpus. Of course, if this interpretation of the Eighth Circuit is allowed to stand, the danger of "sandbagging," as this Court pointed out in *Wainwright,* will have come to have passed. All the defendant will need to do is to object to the jury on grounds other than those which he will later present to the federal court. A hearing will be held in state court, of course, only on those grounds objected to at state trial. Then, on appeal to the state court, the defendant will present, for the first time, his grounds which he will later bring into federal court. The state appellate court, of course, cannot rule because there was no evidence presented by the defendant at the hearing below. In so doing, however, the petitioner contends that the defendant has bypassed his available state remedies by not objecting, at the trial level, on the constitutional grounds. Had he done so, as pointed out in *Wainwright,* a prompt hearing could have been held where the issues are fresh in everyone's mind. It is obvious, from

the fact that the state trial court held a hearing on the objection which the respondent did make, that they were amenable to holding such a hearing.

To obtain federal jurisdiction in the matter in which the Eighth Circuit Court of Appeals allowed the respondent to do, obviously disallows the state court the opportunity to rule upon the respondent's contentions. The respondent had his opportunity, in the trial court, to present and support his objection. He failed to do so. In fact, the respondent had another opportunity, at his hearing on his state post-conviction motion, and he again failed to introduce any evidence on this bystander-juror claim, other than one deputy who testified that he did not choose the bystanders. Further, on appeal from said state post-conviction motion, the respondent did not even raise this issue in the Missouri Court of Appeals. Thus, it is the contention of the petitioner that the respondent bypassed his remedies not once, but twice. Petitioner urges this Court to grant this Petition for a Writ of Certiorari because the Eighth Circuit Court of Appeals' opinion is clearly in conflict with *Wainwright* v. *Sykes,* and, if this opinion is allowed to remain as precedent, the "sandbagging" feared in *Wainwright* will be prevalent among the federal and state courts.

The Issue Decided on Appeal Was not the Issue Presented in the District Court

The petitioner contends that the Eighth Circuit's accepting and deciding of this case, upon the issue that the sheriff chose the bystander veniremen, is a departure from the accepted and normal procedure in that this issue had never been presented in the state court nor in the district court. The issue presented in the district court, on the Application for a Writ of Habeas Corpus, was that the deputy sheriffs who had actually testified for the state were the persons who had chosen the bystander venire-

men. As the Court can see from the Eighth Circuit's opinion, this allegation of the respondent was proven not to be true. The District Court never considered the issue of whether the fact that the sheriff, who had not testified nor investigated the respondent's case, chose the bystander veniremen and, if so, whether there was a denial of due process in so doing. By the injection of this new issue, *i.e.,* that the sheriff chose the bystander veniremen, the case became, in effect, a challenge upon the constitutionality of § 494.250(2), RSMo.

The petitioner suggests that it is a severe departure from procedure for an appellate court to decide a case on a ground not raised in the district court. For these reasons, the petitioner earnestly requests that this Court grant the Petition for a Writ of Certiorari.

No Showing of Actual Prejudice

The petitioner submits that this Court should grant the Petition for a Writ of Certiorari because the Eighth Circuit's holding, that the respondent is not required to show actual prejudice as a result of the sheriff's having chosen the bystander veniremen, conflicts with the decision of the highest appellate court of the State of Missouri, in *State* v. *Eugene Holt,* 592 S.W.2d 759, 768 (Mo. banc 1980).

In addition, there are several other state's cases which also require a showing of actual prejudice in the situation such as occurred in this case. Those cases appear in Appendix A in the Court of Appeals' decision under the subheading "Prejudice to the Defendant." See also *Humes* v. *Robbins,* 128 F.Supp. 586 (D.Me. 1955), where it was held that the defendant had to show the manner in which he was prejudiced by the sheriff's choosing the bystanders. As indicated by the former sheriff's testimony before the Magistrate, in small counties bystander veniremen are often required to be chosen pursuant to § 494.250(2), RSMo.

The highest court of the state of Missouri, in *State* v. *Holt, supra,* has indicated that, absent a showing of actual prejudice, this procedure is not violative of a defendant's constitutional rights. The United States Court of Appeals, in this cause, has held that such a procedure is inherently prejudicial and no showing of actual prejudice is required. Thus, the petitioner submits that it is important that this Court settle the dispute between the highest state appellate court in Missouri and the federal circuit in which it is located as to whether it is inherently prejudicial for a sheriff to choose bystander veniremen as required, when necessary, by state statute.

No Requirements of Findings of Fact and Conclusions of Law

Petitioner's next question presented relates to the fact that the United States Magistrate, following the hearing which was held after remand by the United States Court of Appeals for the Eighth Circuit, made no Findings of Fact and Conclusions of Law concerning th evidence presented. Rule 8, fol. 28 U.S.C. § 2254, requires that, if a hearing on a petition for writ of *habeas corpus* is held in front in front of a magistrate, he shall propose Findings of Fact and Conclusions of Law. Following the Recommendation of the magistrate, the party shall have opportunity to file written objections to the findings, and the judge of the district court shall review the findings if an objection is made. Appellate review of the findings of fact of a district court is limited to whether the lower court's findings were clearly erroneous. *Neil* v. *Biggers,* 409 U.S. 188, 193 (footnote 4), 93 S.Ct. 375, 379 (footnote 4), 34 L.Ed.2d 401 (1972); *United States ex rel. Henne* v. *Fike,* 563 F.2d 809, 813 (7th Cir. 1977), *cert. denied,* 434 U.S. 1072, 98 S.Ct. 1257, 55 L.Ed.2d 776 (1978); Rules 52(a), 81(a)(2), F.R.Civ.P.

In the case at bar, following the district court's denial without a hearing, the United States Court of Appeals for the Eighth Circuit remanded the cause to the district court for a hearing on the issue of the choosing of the bystander veniremen. That hearing was held in front of the United States Magistrate. No Findings of Fact or Conclusions of Law were ever filed by the Magistrate. The only notification the parties received, following this hearing, was the final Eighth Circuit opinion, which was filed on November 12, 1980. Thus, it is obvious that the United States Court of Appeals made the findings of fact, rather than the United States Magistrate who was present and able to observe the demeanor of the witnesses. Further, it is obvious from the Magistrate's questions, which appear in the record of that hearing, that his view of the facts did not equate with the rendition of the facts given by the United States Court of Appeals in their opinion. The petitioner contends that the reason that the tribunal hearing the testimony should make the findings of fact is because they are available to observe the witnesses and what occurs. This is a much more trustworthy manner of resolving factual questions than to have a Court of Appeals, looking only a written record, make all findings of fact. Thus, the petitioner requests that this Court grant the Petition for a Writ of Certiorari because, by failing to have the Magistrate file Findings of Fact and Conclusions of Law, the Court of Appeals did not follow the normal and accepted procedure. The Court of Appeals had no chance to observe the demeanor of the witnesses in making their Findings of Fact, and, further, the parties were not given the chance, as required by Rule 8, fol § 2254, to contest the Findings of Fact and Conclusions of Law which arose out of the hearing.

Burden of Proof

The petitioner submits that a Writ of Certiorari should issue because the United States Court of Appeals for the

Eighth Circuit, in their Order remanding this cause for hearing to the district court, placed the burden of proof on the petitioner, Warden Wyrick. As such, the petitioner suggests that this decision conflicts with federal statute and Supreme Court case law.

It is clear that the burden of proof in *habeas corpus* proceedings is upon the applicant. 28 U.S.C. § 2254(d); *Walker* v. *Johnston,* 312 U.S. 275, 286, 61 S.Ct. 574, 85 L.Ed. 830 (1941); *Johnson* v. *Zerbst,* 304 U.S. 458, 469, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Harned* v. *Henderson,* 588 F.2d 12 (2nd Cir. 1978). However, as can be seen in Appendix A, the Court of Appeals departed from that standard procedure by placing the burden of proof upon the petitioner, Warden Wyrick.

The petitioner objected, in front of the United States Magistrate, upon the burden of proof's being placed upon them. Said objection was overruled. As indicated above, the petitioner had no other opportunity to renew this objection in front of the Court of Appeals, since the Court of Appeals' decision was rendered without findings of fact and a decision being rendered by the district court. The petitioner contends that the Court of Appeals could not have found that the respondent had already presented evidence so as to shift the burden since there had been no evidence presented on this issue in the trial court and the only evidence presented in front of the state post-conviction trial court was that Deputy Kimbrow had not participated in the choosing of the bystander veniremen. As noted above, there was no hearing in the District Court prior to the Eighth Circuit's remand. Thus, there had been no presentation of evidence by the respondent prior to the hearing in front of the magistrate which would have shifted the burden of proof from the respondent, where the statute and case law has placed it, to the petitioner.

The petitioner requests that this Court grant the Petition for a Writ of Certiorari for the reason that the Court of Appeals acted in a manner apart from the accepted and usual course of proceedings in placing the burden of proof upon the petitioner.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

PAUL ROBERT OTTO
Assistant Attorney General

Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

MICHAEL ELBEIN
Assistant Attorney General
of Counsel

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1808

JOHN DALE HENSON, *Appellant,* v. DONALD WYRICK, Warden, Missouri State Penitentiary, *Appellee.*	**Appeal from the United States District Court for the Eastern District of Missouri.**

Submitted: January 18, 1980

Filed: April 29, 1980

Before LAY, Chief Judge, STEPHENSON, Circuit Judge, and THOMAS,* Senior District Judge.

ORDER

This petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, presents a serious question regarding the constitutionality of permitting a sheriff, or members of his office, to select petit jurors from bystanders upon the order of a court in a criminal proceeding. *Cf. Ross* v. *Wyrick,* 581 F.2d 172, 175 (8th Cir. 1978).

*Daniel H. Thomas, Senior District Judge, Southern District of Alabama, sitting by designation.

Petitioner contends the sheriff, or his deputies, selected the bystander jurors for his second degree murder trial upon order of the court, pursuant to Mo. Rev. Stat. § 494.250(2). The record, however, is insufficient to enable us to decide the issue. The only evidence it contains is a deputy sheriff's testimony in the hearing on petitioner's state post-conviction motion, that he did not know by whom the bystanders were selected.

This case, therefore, is hereby remanded to the district court for 60 days, for the limited purpose of obtaining additional evidence by affidavit or otherwise as to how the bystanders were chosen, and certifying the same to this court. In doing so, the burden of proof shall be on the state to show the manner in which the bystander jurors were selected. The case is accordingly remanded to the United States District Court for further proceedings.

IT IS SO ORDERED.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[Not to be published.]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1808

JOHN DALE HENSON,
Appellant,

v.

DONALD WYRICK, Warden,
Missouri State Penitentiary,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: April 29, 1980

Filed: November 12, 1980

Before LAY, Chief Judge, STEPHENSON, Circuit Judge, and THOMAS,* Senior District Judge.

LAY, Chief Judge.

John Dale Henson is a Missouri state prisoner serving a sentence of 35 years for conviction, in Circuit Court of Butler County, Missouri, of second-degree murder. Henson claimed the homicide was in self defense or an accident. His petition for a writ of habeas corpus contends, among other things, that the jury selection process used in his trial violated the due process and equal protection clauses of the fourteenth amendment.

*Daniel H. Thomas, Senior District Judge, Southern District of Alabama, sitting by designation.

Petitioner contends the sheriff or his deputies selected bystander jurors for his trial upon order of the court pursuant to Mo. Rev. Stat. § 494.250(2). Petitioner contends that two of the sheriff's deputies investigated the homicide and testified at trial. In the evidentiary proceeding before the magistrate, the sheriff testified that to select bystander jurors he would go through the phone book or a list prepared by his office and, knowing the people in the county, select "regular citizens [and] high standard people to be jurors." The sheriff admitted that he would sometimes select jurors without relying on the phone book by calling people he thought would be available. Other times the sheriff would select standby jurors from local banks or businesses. The sheriff generally knew all the people he called. He made a conscious effort to select "solid citizens" and persons whom jury service would not inconvenience, e.g., retired persons or, in the winter, farmers. The sheriff's office deputy, who aided in the selection of standby jurors, stated: "We would serve no one that we didn't think would be reliable, dependable person to be a good juror."

The sheriff testified that he was not personally involved in the investigation of the crime for which Henson was convicted. The deputy sheriff who was primarily responsible for the investigation of the defendant's crime testified that he was not involved in selecting jurors or bystander jurors, serving subpoenas on jurors, or compiling the list of bystander jurors. The sheriff selected fourteen of his acquaintances to complete the venire panel for Henson's trial. Seven of the twelve petit jurors came from the sheriff's hand-picked list.

Contemporaneous Objection.

The state argues that the petitioner is precluded from raising an objection to the method of selection of bystander

jurors under the contemporaneous objection requirement of *Wainwright* v. *Sykes,* 433 U.S. 72 (1977). On direct appeal of Henson's conviction, the Missouri Court of Appeals affirmed the trial court's refusal to grant Henson's motion to quash the jury panel because the Court of Appeals found insufficient factual support for Henson's allegations about improper selection of bystander jurors. *State* v. *Henson,* 552 S.W.2d 378, 382 (Mo. Ct.App. 1977). By reaching the issue of the sufficiency of the evidence, the Missouri court impliedly recognized that Henson preserved his objection at trial. The Missouri Attorney General's *Wainwright* v. *Sykes* objection seems anomalous in light of this finding by the highest court of Missouri that Henson had made an objection at trial. We agree with the findings by the United States Magistrate in *Henson* v. *Wyrick,* No. 78-970C(4) (E.D. Mo. April 20, 1979) and the district court, No. 78-970C(3) (E.D. Mo. September 6, 1979), that no Missouri procedural requirement prevents federal jurisdiction over the constitutional issue raised by Henson's petition.

Denial of Due Process.

The issue in this case is whether a sheriff whose subordinates investigated and arrested the defendant for a crime has violated the defendant's due process rights by hand-picking from among the sheriff's acquaintances the bystanders who became petit jurors. There appears to be no controlling Supreme Court or Eighth Circuit authority. The state argues that *Cravens* v. *United States,* 62 F.2d 261 (8th Cir.), *cert. denied,* 289 U.S. 733 (1933), authorizes a sheriff to hand-pick bystander jurors unless the sheriff was active in the investigation and prosecution of the defendant. *Cravens* does not involve a due process claim but involves rather the interpretation of when a marshal is "interested" in a prosecution within the meaning of a

now repealed federal statute.[1] *Id.* at 271. *Cravens* held that federal district courts did not have to appoint a disinterested person to select bystander jurors, and could rely on the marshal to select such jurors, when the marshal was not "interested in the cause." *Id.*[2] In addition to involving different substantive law, *Cravens* is factually distinguishable from this case in two important respects. First, in *Cravens,* there was no indication that the marshal selected the bystander jurors from among his acquaintances. In this case, the sheriff hand-picked his acquaintances as jurors. Secondly, in *Cravens,* the marshal was found to have no "interest" in the case inasmuch as he had not been involved with the investigation, investigators, prosecution or prosecutors. In this case, however, the sheriff's subordinates were responsible for the investigation and arrest of the defendant. Because *Cravens* involved a federal statute and not the Constitution, these distinctions are not dispositive of the issue presented here. Neverthe-

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[1]Act of Mar. 3, 1911, ch. 231, §§ 279-280, 36 Stat. 1165, 28 U.S.C. §§ 416-417 (Supp. VII 1933), *as amended by* Act of Jan. 31, 1929, ch. 126, 45 Stat. 1145, 28 U.S.C. § 417 (1934). Section 417 provided:

> When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid [*see* 28 U.S.C. § 416 (1934)], jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in section 416 of this title.

These provisions have been replaced by Act of Mar. 27, 1968, P.L. 90-274, § 101, 82 Stat. 59, 28 U.S.C. § 1866(f), which is quite different from the earlier version.

[2]Where a federal marshal was involved in the investigation or prosecution of someone, the marshal was disqualified from selecting the bystander jurors. In such a situation, 28 U.S.C. §§ 416-417 (1934) required appointment of a disinterested person to select bystander jurors in the marshal's stead. *Johnson* v. *United States,* 247 F. 92 (9th Cir. 1917); *Cravens* v. *United States,* 62 F.2d 261, 271 (8th Cir. 1933).

less, this court's recognition in *Cravens* of the fundamental unfairness of an interested official hand-picking the bystander panel is the central concern in this case. *See also Johnson* v. *United States,* 247 F. 92 (9th Cir. 1917).

Judicial and Congressional Concern With Abuse of Discretion in Jury Selection.

The issue of the sheriff's hand-picking jurors came before this court in another Missouri state prisoner's habeas petition in *Ross* v. *Wyrick,* 581 F.2d 172 (8th Cir. 1978). In *Ross,* this court held the sheriff's personal selection of black persons for a venire panel in a criminal case did not cure the unconstitutional underrepresentation of blacks on the master jury list. *Id.* at 175. Although it is unclear whether *Ross's* holding was based on the defective master jury list, the sheriff's arbitrary selection, or both, *id.* at 175 n.8, there is no question that this court was concerned with the opportunity for the sheriff to abuse his or her discretion in selecting venire panel members. *Id.* at 174-75.

This court's statements in *Ross* about the potential for officers to abuse their discretion in selecting jurors echoed the longstanding concerns of other federal courts. *Glasser* v. *United States,* 315 U.S. 60, 85-86 (1942) (dictum); *Cravens* v. *United States,* 62 F.2d 261, 271 (8th Cir. 1933) (dictum); *Gideon* v. *United States,* 52 F.2d 427, 429 (8th Cir. 1931) (clerk of court abused discretion by sending out a questionnaire to prospective jurors); *United States* v. *Gordon,* 253 F.2d 177, 184 (7th Cir. 1958) (dictum); *United States* v. *Dennis,* 183 F.2d 201, 220-21 (2d Cir. 1950) (dictum), *aff'd,* 341 U.S. 494 (1951); *Ippolito* v. *United States,* 108 F.2d 668, 669-70 (6th Cir. 1940) (dictum); *Johnson* v. *United States,* 247 F.92 (9th Cir. 1917) (special officer should have been appointed to select bystander jurors where marshal was personally involved in the investigation

of defendant); *Humes* v. *Robbins*, 128 F. Supp. 586 (D. Me. 1955) (dictum). The Supreme Court described the potential dangers of excessive discretion in officials who select jurors in *Glasser*:

> And, its [the duty of selecting jurors] exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a "body truly representative of the community," and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties.

315 U.S. at 85-86. *See also Murrah* v. *State*, 532 F.2d 105 (8th Cir. 1976).

Congressional concern for fundamental fairness in the method of selecting bystander jurors has caused federal selection methods to evolve from one of marshals selecting bystanders from persons present in court[3] to a method of

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[3]Act of Mar. 3, 1911, ch. 231, § 280, 36 Stat. 1165, 28 U.S.C. § 417 (1934).

random selection from specified lists in a manner ordered by the court.[4] This legislative change was prompted in large part by congressional desires to eliminate "subjective screening" of potential jurors. H.R. Rep. No. 1076, 90th Cong., 2d. Sess., *reprinted in* [1968] U.S. Code Cong. & Ad. News 1792, 1794, 1797.

Furthermore, many state courts have also expressed concern over the unbridled discretion of officials in the selection of bystander jurors. *See State* v. *Olek,* 288 Minn. 235, 179 N.W.2d 320, 326 (1970) (after sheriff had picked two persons personally acquainted with him to complete a venire panel, the court ordered the sheriff to select eight others who were not acquainted with him from which the panel would be completed); *Howard* v. *State,* 103 Tex. Crim. App. 205, 280 S.W. 586, 587 (1926) (sheriff's picking jurors from lists supplied by railroad shop foremen was strongly condemned); *Hargo* v. *United States,* 1 Okl. Crim. App. 590, 98 P. 1021 (1909) (deputy marshal who excluded from list of bystanders all persons who admitted acquaintance with defense counsel acted improperly; conviction reversed); *Colwell* v. *Commonwealth,* 320 S.W.2d 116, 120 (Ky. 1959) (court strongly condemned practice by court clerk of notifying her friends that jury service would be available when court instructed sheriff to select talesmen); *People* v. *Bedard,* 11 Ill. 2d. 622, 145 N.E.2d 54 (1957) (it was reversible error under an Illinois statute for the trial court to refuse to appoint a special bailiff to summon bystander jurors upon defendant's motion where the sheriff's office was interested in the case before the court); *Coy* v. *State,* 288 S.W.2d 782, 783-84 (Tex. Crim. App. 1956) (it was reversible error under Texas statute for sheriff to hand-pick tales rather than to select them from the jury

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[4]Act of Mar. 27, 1968, P.L. 90-274, § 101, 82 Stat. 59, 28 U.S.C. § 1866(f).

wheel where county by statute was required to use wheel to select venire panel).

Prejudice to the Defendant.

A number of state cases require the defendant to show actual prejudice before a conviction will be reversed on the grounds that the sheriff allegedly abused his or her discretion in the selection of bystander jurors. *See State* v. *Holt,* 592 S.W.2d 759, 767-68 (Mo. 1980) (sheriff's hand-picking of jurors is permissible absent a showing of affirmative prejudice); *Smith* v. *State,* 241 Ark. 748, 410 S.W.2d 126 (1967) (it was not reversible error to allow sheriff who was a state's witness to hand-pick two jurors from a jury list absent a showing of actual prejudice to the defendant); *Taylor* v. *State,* 420 S.W.2d 601, 605 (Tex. Crim. App. 1967) (the sheriff's hand-picking of tales was not error); *State* v. *Shaw,* 284 N.C. 366, 200 S.E.2d 585, 587 (1973) (since defendant had an opportunity to examine the tales on voir dire, and alleges no violation of trust by the sheriff, the sheriff's summoning of additional jurors was not error); *State* v. *White,* 6 N.C. App. 425, 169 S.E.2d 895, 897 (1969) (in absence of proof that officer has violated the discretionary trust placed in him to select and summon tales, the officer should remain free to use his or her best judgment in carrying out the orders of the trial court); *State* v. *Sturdivant,* 31 N.J. 165, 155 A.2d 771, 774-75 (1959), *cert. denied,* 362 U.S. 956 (1960) (sheriff's exercise of discretion is authorized in selection of tales, but sheriff must not willingly select partial jurors or accept the suggestion of a litigant. Defendant must show affirmative prejudice to obtain reversal. *Id.* at 776).

In *Humes* v. *Robbins,* 128 F. Supp. 586 (E.D. Me. 1955), the federal district court found no prejudice in a state trial where preliminary precautions were taken to insure that the sheriff's discretion to select bystander

jurors was not abused. The sheriff who investigated the crime, arrested the defendant and served as a witness for the state, was nevertheless allowed to pick the bystanders for the jury. The district court observed:

> Humes told his counsel that he mistrusted the sheriff's disinterestedness in selecting talesmen and his counsel took the matter up with the court. The court thereupon called a conference in chambers with the prosecuting attorney, Humes' attorney, and the sheriff, at which the court ordered the sheriff not to tell the persons he ordered into court for service as talesmen anything about the case upon which they might be selected to sit, or to mention Humes' name in connection with it. It was also then agreed that Humes' counsel might interrogate each talesman as he was called for examination prior to selection as a juror. . . . Neither Humes nor his counsel made any further objections to the selection of talesmen by the sheriff.

128 F. Supp. at 588-89.

The constitutional defect in Henson's jury is that the sheriff hand-picked his acquaintances to complete the venire panel. That some jurors were acquaintances of the sheriff would not itself invalidate the conviction. *United States* v. *Carr,* 584 F.2d 612, 616 (2d Cir. 1978), *cert. denied,* 440 U.S. 935 (1979); *United States* v. *Hurd,* 549 F.2d 118, 120 (9th Cir. 1977); *United States* v. *James,* 453 F.2d 27, 28 (9th Cir. 1971); *United States ex rel. Cooper* v. *Reincke,* 219 F. Supp. 733, 741 (D. Conn. 1963), *aff'd,* 333 F.2d 608 (2d Cir.), *cert. denied,* 379 U.S. 909 (1964). Also, that the court allowed some discretion in the selection of jurors would not invalidate the conviction. *Townsend* v. *Ross,* 396 F.2d 573, 577 (8th Cir. 1968); *Beatrice Foods Co.* v. *United States,* 312 F.2d 29, 35 (8th Cir. 1963); *Cravens,* 62 F.2d at 270. In this case, however, the sheriff exercised his dis-

cretion to ensure that only his acquaintances would fill venire panel vacancies.

The potential for a conviction prone jury under such a system is substantial. Although perhaps not directly involved in the investigation of Henson's crime, the sheriff was the immediate supervisor of the deputies in charge of the case. Regardless whether the sheriff had spoken with his deputies about the case or had formed an opinion as to Henson's guilt before the trial, there is a great potential for the sheriff to hand-pick jurors sympathetic to the prosecution. Where, as here, the jurors are picked according to the sheriff's subjective rather than objective criteria, the opportunity for the sheriff to express his allegiance to the prosecution by selecting sympathetic jurors is unlimited. *Cf. Turner* v. *Fouche,* 396 U.S. 346, 360 (1970); *Singleton* v. *Estelle,* 492 F.2d 671, 678 (5th Cir. 1974). In such situations, there is considerable risk that the bystander jurors will mirror the sheriff's own biases.

In addition to the likely predisposition of his selections, a jury could easily associate the credibility of the sheriff with his deputy, who testified against Henson. It is true that Henson's trial counsel had the opportunity to show bias on voir dire and protect Henson from the potentially prejudicial selection methods of the sheriff. But where the potential of prejudice is so great we fail to see how an opportunity for counsel to conduct a voir dire can undo the harm already done. The subtleties involved in identifying jurors' sympathies and predicting their evaluation of deputies' prospective testimony are often too intangible to identify during voir dire. When the potential prejudice is as great as it was here a showing of actual prejudice to the defendant is not necessary in order to warrant a new trial.[5]

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[5]In *Peters* v. *Kiff,* 407 U.S. 493 (1972), the Supreme Court dis-

(Continued on next page)

We conclude that Henson was denied due process and a trial by a fair jury. A method employing random selection from a master jury list, appointing a special bailiff to select bystander jurors, or otherwise limiting the sheriff's discretion would require more time to select such jurors, but fundamental fairness to the defendant requires some method better designed to obtain an impartial jury than the sheriff hand-picking among his acquaintances.

Footnote continued
cussed the showing required of a defendant who alleged that a defect in his jury deprived him of due process. The Court stated:

> Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias. This rule, too, was well established long before the right to jury trial was made applicable in state trials, and does not depend on it. . . . As this Court said in *In re Murchison, supra,* "[f]airness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." 349 U.S., at 136.
>
> These principles compel the conclusion that a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.

Id. at 502-03.
The Court concluded:

> It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. For there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case. Consequently, it is necessary to decide on principle which side shall suffer the consequences of unavoidable uncertainty. See *Speiser* v. *Randall,* 357 U.S. 513, 525-526 (1958); *In re Winship,* 397 U.S. 358, 370-373 (1970) (Harlan, J., concurring). In light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in

(Continued on next page)

We hold that the ends of justice and due process will be served if Henson is granted a new trial.

The denial of the petition for a writ of habeas corpus is ordered reversed; the district court is ordered to grant the writ of habeas corpus directing release of the petitioner unless the petitioner is granted a new trial within a reasonable time as to be determined by the district court.

It is so ordered.

A true copy.

ATTEST:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Footnote continued

favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few.

Id. at 504 (citations omitted).

In *Turner* v. *Louisiana*, 379 U.S. 466 (1965), the Supreme Court overturned a conviction by a jury which had been placed in the custody of two deputy sheriffs who were the prosecution's chief witnesses. *Id.* at 471-73. The grounds for overturning that conviction were "the potentialities of what went on outside the courtroom" while the jury was with the deputies. *Id.* at 473. In *Turner*, the court overturned the conviction because of the potential of an ex parte, extra-record communications with jurors by prosecution witnesses.

The Supreme Court has employed the vehicle of probability of prejudice to overturn other convictions as well. *See, e.g., Sheppard* v. *Maxwell*, 384 U.S. 333, 352-55 (1966); *Estes* v. *Texas*, 381 U.S. 532, 544 (1965); *Rideau* v. *Louisiana*, 373 U.S. 723, 727 (1963).

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JOHN DALE HENSON, etc., *Petitioner,* v. DONALD WYRICK, Warden, *Respondent.*	**No. 78-970 C (3)**

ORDER

This matter is before the Court on the petition of John Dale Henson for a writ of habeas corpus. After consideration of the Review and Recommendation of the United States Magistrate and petitioner's exceptions thereto,

IT IS HEREBY ORDERED that the Review and Recommendation of the United States Magistrate be and is ADOPTED, and that the petition of John Dale Henson for a writ of habeas corpus be and is DISMISSED without further judicial proceeding.

Dated this 6th day of September, 1979.

Edward L. Filippine
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JOHN DALE HENSON, etc., *Petitioner,* v. DONALD WYRICK, Warden, *Respondent.*	No. 78-970 C (4)

MAGISTRATE'S REVIEW AND RECOMMENDATION

John Dale Henson is once again before this Court seeking federal habeas corpus relief. Petitioner originally sought in his application to be released on bond, pending the appeal of his 27.26 motion. On December 22, 1978, the undersigned United States Magistrate returned a recommendation that the petitioner's application be dismissed without further proceedings. This recommendation denying bond has not been acted upon by the District Court at this time. Petitioner then filed a motion requesting additional time to file an amended application, which was granted. Petitioner has since filed his amended application.

Petitioner has presented new issues in support of his request for habeas relief. These issues are:

(1) The trial court erred in refusing to grant petitioner's motion to quash the jury panel, in that § 494.250 R.S.Mo. (1969) is unconstitutional because it allows a sheriff or deputy to select jurors at his discretion.

(2) The trial court erred in refusing to instruct the

jury on self-defense in addition to the instruction the court gave on excusable homicide.

(3) That the trial court erred in refusing to grant petitioner's motion to quash the jury panel, because the panel was not selected in accordance with § 494.250 R.S.Mo. (1969).

(4) Petitioner was denied a fair and impartial trial because women were given special exemptions in regards to their serving on jury panels.

The respondent first reminds us that petitioner has filed a motion to vacate judgment and sentence, pursuant to Missouri Rule of Criminal Procedure 27.26, in the Missouri Court of Appeals, Southern District. The respondent further relates that the issues raised in that motion are not the same as raised by petitioner in the immediate proceeding. As the issues raised in said motion are different from those raised in the present proceeding, this Court is of the opinion that said court proceedings would not be a bar to consideration by this Court.

Petitioner's first issue raises a somewhat troubling and serious situation. We will, therefore, defer consideration of this matter until after our analysis of the other issues raised by the petitioner.

Peitioner's second allegation is that the trial court erred in refusing to instruct on self-defense in addition to the instruction the court gave on excusable homicide. Generally, an alleged error of refusal of a trial court to give a particular instruction is not cognizable in a habeas corpus action. *Wilson* v. *Parratt*, 540 F.2d 415 (8th Cir. 1976); *DeBerry* v. *Wolff*, 513 F.2d 1336 (8th Cir. 1975). Thus, petitioner must establish that said error was a fundamental defect which inherently resulted in a complete miscarriage of justice. *DeBerry* v. *Wolff, supra.*

Petitioner, in his traverse, argues the case of *Hughes* v. *Mathews,* 576 F.2d 1250 (7th Cir. 1978). After reading this case, it is quite apparent that it is totally inapplicable. Petitioner's case deals with an instruction based on self-defense, which is an affirmative defense. Such an affirmative defense requires the defendant to carry the burden of proof on said issue. In *Hughes,* the court was concerned with the degree of proof necessary to prove intent to commit first degree murder as opposed to second degree murder, and the affect of certain presumptions that arose under state law. As a result, this case is totally irrelevant as to self-defense. After a careful review of the trial transcript, this Court is convinced that the trial court made no substantial error in its instructions, and that even if slight error was present, it was not sufficient to give rise to a miscarriage of justice.

Petitioner's third allegation is that the trial court erred in refusing to grant petitioner's motion to quash the jury panel, because the panel was not selected in accordance with statutory provisions. First of all, this issue has been thoroughly litigated through the Missouri Court of Appeals, Springfield District. At issue in this allegation is the fact that four absentee veniremen, who had presented excuses, were not excused before the fourteen additional members were summonded by the special venire proceedings. An allegation that state courts have failed to comply with state law in a criminal proceeding is purely a matter of local concern, and not normally reviewable by a federal court under the due process clause. *Cox* v. *Hutto,* 589 F.2d 394 (8th Cir. 1979). Petitioner has failed to set out any facts which would establish that the failure to comply precisely with the statute, i.e., to excuse the absent members prior to calling the special venire, in any way resulted in prejudice to him. It is clear from the record that these four absent veniremen were not going to be required to serve on the

jury panel that day. We are convinced that petitioner has not been prejudiced in any way by the order in which the four absent venirement were excused.

Petitioner's fourth allegation is that he was denied a fair and impartial trial because women were given special exemptions in regards to their serving on jury panels. The respondent points out that petitioner failed to directly appeal this issue. The retroactive effect of *Duren* v. *Missouri,* ____ U.S. ____, 47 L.W. 4089 (1979), has been dealt with by the United States Supreme Court in *Lee* v. *State of Missouri,* No. 77-6066 (U.S. Sup. Ct., January 15, 1979). It was held in *Lee* that, " ..... in any case in which a jury was sworn subsequent to *Taylor* v. *Louisiana,* and the fair-cross-section claim based on exclusion of women was rejected on a direct review or in state collateral proceedings, because of the defendant's failure to exert the claim in timely fashion, relief is unavailable under 28 U.S.C. § 2254, unless the petitioner can show cause for having failed to raise his claim properly in the state courts." The respondent argues that petitioner has failed to show said cause.

At the time of petitioner's trial, the exemption for women was still being allowed in Missouri, in light of *Taylor* v. *Louisiana,* 419 U.S. 522 (1975). The holding in *Taylor* would have raised the suspicion that said exemption was suspect. However, as was stated in *Duren, supra,* a *prima facie* case must be made before the exemption would be determined unconstitutional. We cannot and will not speculate as to whether petitioner could have made such a case. It is clear that petitioner had the opportunity to raise such an objection concerning the exemption, but failed to do so. Petitioner has failed to offer us any plausible reason for such failure. Accordingly, we conclude that petitioner has failed to show cause and this allegation is not sufficient to justify habeas relief.

The petitioner's first allegation, which we have delayed until now to discuss, challenges the constitutionality of § 494.250 R.S.Mo. (1969). The petitioner contends that said statute is unconstitutional because it allows a sheriff or deputy to select jurors at their own discretion. Additionally, petitioner argues it alolws deputies, who may be witnesses at trial, to select venire panel members. The main thrust of the petitioner's allegation is that this selection process in essence, denies a defendant a jury selected from a fair cross-section of the community.

The Eighth Circuit has recently dealt with jury selection procedures in the case of *Ross* v. *Wyrick*, 581 F.2d 172 (8th Cir. 1978). *Ross* concerned itself with jury panels selected, pursuant to a "key man" system. One of the major horrors attempted to be alleviated by the court in *Ross*, was the opportunity for discrimination which was present under the "key man" system. This opportunity for discrimination was significantly increased with the additional procedure of allowing the sheriff to select a special venire panel.

In *Ross*, the petitioner was able to establish a *prima facie* case of discrimination. In particular, *Ross* was able to establish that blacks had been systematically excluded from jury panels. The *Ross* court went on to state that, "The state cannot successfully contend that by allowing the chief law enforcement officer of the county to personally select the only black members on the venire panel in a criminal case, it overcame any constitutional deficiency in the selection process for the master list. (Citations omitted)."

The most recent statements as to the requirements to establish a *prima facie* case of violation of the fair cross-section requirement, is *Duren* v. *Missouri, supra*. In *Duren*, at p. 4090, the United States Supreme Court set out the following requirements to establish a *prima facie* violation of the fair cross-section requirements:

(1) that the group alleged to be excluded is a "distinctive" group in the community;

(2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

(3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

In the case before us, we have quite a different situation than that presented in the two cases discussed above. The issue presented by petitioner in this case deals with the procedures for calling a special venire once a shortage of jury panel veniremen occurs. The evil being attacked is the discretion which the sheriff or deputies are allowed to exercise in deciding just who among the bystanders will be selected to fill the panel vacancies. Thus, it appears that the underlying rationale in *Ross* and *Duren,* supra, is equally important in this case. In those two cases, it appears that the main thrust behind the judicial determinations was to prevent abuses inherent in the discretionary inclusion or exclusion of certain classes of citizens. It would, therefore, seem that regardless of where the discretion is exercisable, be it at the time the master list is established or when the jury panel is actually picked, should not alter the underlying problem that we are attempting to eliminate.

The petitioner's allegation appears to be strengthened in light of the person who actually does the selection. The statute authorizes a sheriff or deputy to actually select the additional jury members. This procedure gives us great concern because in most situations, it would appear that the sheriff or deputy, being a law enforcement officer in rural Missouri, would have a tendency to be prosecution orientated. The petitioner has even argued that in his case, the sheriff or deputies who actually did the selection, also

testified in court against him. This allegation, is in fact, somewhat substantiated by the record. However, in petitioner's case, the deputies were not damaging eye-witnesses to the actual commission of the crime, but were merely arresting officers, who testified concerning the scene of the crime and outlined procedures taken by them afterwards. Regardless, their allegiance is undeniably with the prosecution. It resolves itself into being a dangerous combination of law enforcer and jury selector. The petitioner also argues that this selection procedure has also been questioned in the "MISSOURI BENCH BOOK FOR MISSOURI TRIAL JUDGES (Jefferson City, Missouri 1974), 11.14 'Petit Jury—Summoning of Jurors (Continued).':

> "IF ADDITIONAL JUROS [sic] ARE REQUIRED THEY SHOULD BE SUMMONED IN A RANDOM MANNER, AND NOT INDIVIDUALLY SELECTED BY THE SHERIFF OR OTHER OFFICER. THIS RECOMMENDATION IS MADE ON THE BASIS OF NUMEROUS RECENT CHALLENGES TO JURIES IN STATE AND FEDERAL COURTS, AND IS MADE DESPITE NUMEROUS CASES SANCTIONING THE SELECTION OF BYSTANDERS, ETC. SEE Sections 494.060 and 494.290."

The petitioner points out that although said procedure has some case authority, there are recent cases and trends to the contrary and, therefore, judges should refrain from using said procedure in the future.

We have considered this particular issue in spite of the respondent's protestations that the petitioner has not exhausted his remedies toward it. The respondent has, in fact, elected to respond to this issue by only addressing the exhaustion issue. We have considered his argument and conclude that the petitioner has impliedly exhausted his

state remedies in his appeal. We are further of the opinion that to require the petitioner to satisfy the technical requirements of exhaustion at this late date would be an exercise in futility. Therefore, in all fairness to the petitioner and in the interest of judicial expediency, we have considred this issue on the merits. *Wilwording* v. *Swenson*, 404 U.S. 249 (1971).

We conclude that while the procedure is highly suspect and, therefore, we would question its future use, the pivotal querry still remains as to whether the petitioner's rights have been unconstitutionally violated. It would be safe to say that the due process clause does not, in itself, guarantee a defendant a randomly selected jury. Instead, the clause requires simply a jury drawn from a fair cross-section of the community. It would then be necessary to show prejudice to establish that the procedure used, defeated a fair possibility for obtaining a truly representative cross-section of such community. The requirements to determine whether a *prima facie* case has been established were set out previously. The petitioner has not been able to establish any of those grounds and we are inclined to believe that he could not.

Therefore, it is the recommendation of the undersigned United States Magistrate that petitioner's application be dismissed. The parties are hereby advised that they have ten days from the service of this recommendation within which to file objections to same, pursuant to 28 U.S.C. § 636(b).

Dated: April 20, 1979.

William S. Bahn
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JOHN DALE HENSON, etc., *Petitioner,* v. DONALD WYRICK, Warden, *Respondent.*	**No. 78-970 C (3)**

ORDER

This matter is before the Court on remand from the United States Court of Appeals for the Eighth Circuit. By order dated April 29, 1980, the Court of Appeals remanded this case for the limited purpose of obtaining additional evidence on the method by which bystanders were chosen for service as petit jurors in petitioner's criminal trial. The Court of Appeals has directed that the additional evidence, by affidavit or otherwise, be taken and certified to that Court within 60 days.

Accordingly,

IT IS HEREBY ORDERED that this case be and is referred to United States Magistrate William S. Bahn, pursuant to 28 U.S.C. § 636(b), for the purpose of obtaining additional evidence as directed by the Court of Appeals.

Dated this 30th day of April, 1980.

Edward L. Filippine
UNITED STATES DISTRICT JUDGE

APPENDIX C

STATE OF MISSOURI, *Plaintiff-Respondent,* v. JOHN DALE HENSON, *Defendant-Appellant.*	**No. 10368.**

Missouri Court of Appeals, Springfield District.

June 13, 1977.

Before BILLINGS, C. J., and HOGAN and FLANIGAN, JJ.
FLANIGAN, Judge.

John Dale Henson, charged as a second offender, was found guilty by a jury of the second degree murder of his 14-year-old nephew Jackie Fletcher. Judgment was entered on the verdict and defendant received a sentence of 35 years. Defendant appeals.

Defendant's first point is that the trial court erred in refusing to instruct the jury on the issue of self-defense. The trial court did instruct the jury on excusable homicide, (MAI-CR. 2.28 "The Killing of Another by Accident or Misfortune").

If there was substantial evidence of self-defense, the trial court was required to instruct thereon, whether requested or not. *State* v. *Boyd,* 498 S.W.2d 532, 533[1] (Mo. 1973). In determining whether the evidence was sufficient to support the giving of a self-defense instruction, this court must consider the evidence in the light most favorable to the defendant. *State* v. *Cole,* 377 S.W.2d 306, 307[1] (Mo. 1964).

The defenses of self-defense and accident are inconsistent. *State* v. *Peal,* 463 S.W.2d 840, 842 (Mo. 1971). If the shot was fired in self-defense, the firing resulted from the voluntary act of defendant; if the shot was accidental, the act was involuntary. *State* v. *Harkins,* 535 S.W.2d 462, 464 (Mo.App. 1976). Both defenses, self-defense and accident, must be submitted where each is supported by the evidence, unless defendant's personal testimony is relied upon to support both. *State* v. *Sanders,* 541 S.W.2d 530, 533[2] (Mo. banc 1976).

The parties stipulated that Jackie's death, which occurred on April 13, 1975, was caused by a gunshot wound to the forehead. The shooting took place at the trailer home of Gladys Henson, mother of defendant and grandmother of Jackie. Jackie had been living with his grandmother for about two weeks. Present at the time the shooting took place, in addition to defendant and the victim, were Kenneth Huggins, the state's principal witness, and Gladys Henson, the principal defense witness. Defendant did not testify.

According to Huggins, he and defendant had spent most of April 13, 1975, drinking beer. Later that evening, some time after Jackie and Gladys had gone to bed, Huggins and defendant went to Gladys's trailer. The living room of the trailer adjoins the kitchen. Jackie and Gladys arose after the two men entered. A bowl of greens was sitting on a table. Defendant picked up a handful of greens, threw them on the table, and told Gladys he wished she would fix him something to eat. Defendant teased Gladys, and he "was speaking maybe a little loud, probably cussing some."

Huggins said that Jackie kept trying to get defendant to get up from where he was sitting. Jackie "was wanting to whip him for some reason, and he kept on, and (defendant) did get up once, and he set back down. (Jackie) said, 'You're not going to talk to my grandmother that way.' "

"Q. What happened then?

"A. Well, the boy just kept on and on, and after a bit John just jumped up and ran outside the door and came back in with the gun.

"Q. Now, what happened when John Dale Henson came back into the house?

"A. He came in, and after I heard him come in I turned and looked, like this, and I saw the gun and it fired at that time and the boy fell." . . .

"Q. How fast did this shot transpire after John come back in the house?

"A. Well pretty fast. By the time I turned and saw the gun and everything, it fired, and just that fast, real fast.

"Q. Was it just a split second time thing?

"A. Like I turned like this and looked, and the gun went off."

According to Huggins, at the time the gun was fired, defendant's arm "was extended out from his chest." Huggins had seen the gun earlier that day when it was in the defendant's car. At that time it was in a holster and the hammer on it was not cocked. After looking at the gun, Huggins placed it back in the holster and put it under the car seat, still uncocked. Huggins testified that he did not see Jackie "with any sort of weapon that evening." Jackie and the defendant were approximately the same size. When the shooting took place the defendant was about 12 feet from Jackie. Jackie was then standing in the center of the kitchen and the defendant was about one step inside the front door of the trailer.

Gladys testified that about 10 p.m., prior to the defendant and Huggins, Jackie had fixed himself two cheese-

burgers with the use of a butcher knife. After defendant and Huggins arrived, defendant began to kid her about the turnip greens. Gladys told defendant he was silly for drinking and defendant told her that she was an old fuddy duddy. This made Jackie mad "so he run at (defendant) and hit him and knocked (defendant) backwards. (Defendant) shoved (Jackie), and I grabbed (Jackie) by the shoulder and pulled him back. (Jackie) just kept getting madder and madder."

Gladys also testified that when she grabbed Jackie and pulled him back, Jackie picked up the butcher knife and "drawed it back." When that happened, defendant left the trailer, making the statement, "I have something in the car for you." The defendant came back in with a gun. While defendant was outside the trailer getting the gun, according to Gladys, "Jackie just stood there . . . I told him to put the knife down but it didn't do no good."

Gladys testified that when the defendant returned to the trailer with the gun, he stood on the partition line between the living room and the kitchen, about three feet from Jackie. Jackie had the knife in his hand at that time, "he just still kept it drawed back, holding it drawed back." When asked whether Jackie was waving the knife back and forth, Gladys said, "I don't know, I can't swear to that. I just know he had it drawed back." Gladys said that the defendant was then holding the gun in his hand and was "looking down toward the floor." Defendant yanked the holster off the gun and it went off. Defendant was not holding the gun out in front of him but had it down "along about his stomach" with his head and shoulders bent. Gladys stated that she did not see defendant "ever point the gun at Jackie." She also said that the shot was fired just a second or two after defendant stepped back in the trailer.

The right of self-defense is not to be invoked unless

all other means fail. *State* v. *Roberts,* 294 Mo. 284, 242 S.W. 669, 674 (1922). "If he could have safely avoided using the weapon he was not justified in taking the life of the deceased." *State* v. *Johnson,* 76 Mo. 121, 126 (1882). "The law of self-defense may imply the right of attack when it appears reasonably necessary to protect one's self from an impending assault. . . . Yet it remains the law of necessity, real or apparent. And the danger must be imminent or reasonably appear to be so." *State* v. *McGee,* 361 Mo. 309, 234 S.W.2d 587, 591[6] (Banc 1950). "Self-defense is a last resort and in order to justify a homicide on such grounds the doer of the homicidal act must have done everything in his power, consistent with his own safety, to avoid the danger and avert the necessity, and he must retreat, if retreat be practicable." *State* v. *Sherrill,* 496 S.W.2d 321, 325[14] (Mo.App. 1973); *State* v. *Jackson,* 522 S.W.2d 317, 319[3] (Mo.App. 1975).

Although the jury could have found that Jackie was the aggressor in the initial confrontation between him and defendant, that confrontation ended upon defendant's departure from the trailer. Jackie did not pursue him. The testimony of Gladys, who alone said that Jackie had a knife, was that "Jackie just stood there." Defendant went outside, entered the automobile, and obtained the gun. His re-entry into the trailer was not a product of "necessity, real or apparent." Far from doing "everything in his power, consistent with his own safety, to avoid the danger and avert the necessity," *State* v. *Sherrill,* supra, defendant re-entered the trailer and immediately shot his victim.

The law will not condone defendant's voluntary resumption of the confrontation nor its tragic consequences. The right of self-defense, precious and fundamental as it is, will not be contorted into a hunting license.

In *State* v. *Adkins,* 537 S.W.2d 246 (Mo.App. 1976),

defendant and his victim were fighting each other in an automobile. Thereafter the defendant emerged from the automobile, but re-entered it and resumed the struggle which culminated in the death of his adversary. In rejecting defendant's contention that the trial court erred in refusing to instruct on self-defense, the court said, at p. 249:

"The force used in self-defense must not exceed the bounds of what is necessary or reasonably appears necessary for defense or prevention. . . . Further, where the accused continued or *renewed* the struggle when he had an opportunity to abandon or decline further, he became the aggressor, irrespective of whether he was at fault with the original difficulty, and is not justified in claiming self-defense. 40 C.J.S. Homicide § 133."

The evidence in this record would not support a finding that defendant "had reasonable cause to believe and did believe that it was necessary for him to act as he did to protect himself from such danger." The quoted finding "must be included in every self-defense instruction in homicide cases." Para. 3 of Notes on Use to MAI-CR. 2.40.

The trial court properly refused to instruct the jury on the issue of self-defense. *State* v. *Adkins; State* v. *Roberts; State* v. *McGee; State* v. *Sherrill,* all supra.

Defendant's second point is that the trial court erred "in refusing to grant defendant's motion to quash the jury panel in that said panel was not selected in accordance with § 494.250 RSMo 1969, which requires the regular and alternate list of perspective (sic) jurors to be exhausted before ordering the sheriff to summon prospective jurors from bystanders."

The trial judge was Hon. Flake L. McHaney, who replaced the regular judge, Hon. Rex A. Henson, the latter having been disqualified on defendant's motion. After

the jury panel was sworn, defendant's counsel orally moved that the entire[1] panel be "discharged" on several grounds, including the only one mentioned in his second point, and elaborated upon in the argument portion of the brief, to the effect that the sheriff summoned bystanders "before the list of alternate petit jurors had been exhausted." Even if, which need not be decided, the cited statute was applicable to this situation, the fact is that the list of alternate petit jurors had been exhausted before the sheriff summoned the bystanders.

In connection with defendant's motion, the court heard the testimony of the circuit clerk. He testified that Judge Henson had, prior to the trial of this case, excused all but 23 of the members of the original list of jurors summoned pursuant to § 494.250, para. 1.[2] Of the 23, 19 were present at the commencement of this trial as panel members. The other four were two women, a 74-year-old man, and a man who "has a one-man insurance office." It is the essence of defendant's complaint that the bystanders were summoned before these four people were excused.

Although the four people were not present in the courtroom, Judge McHaney entered an order excusing the two women "based on the statute which permits them to request to be excused" (§ 494.031[2]), excusing the 74-year-old man "because of his age" (§ 494.031[1]), and excusing the insurance man "since he is a one-man operation" (§ 494.031[9]). It will be observed that, by reason of Judge McHaney's proper excusing of the four people, "the list

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[1]"In order, however, to constitute a ground for a challenge to, or motion to quash, the array, his objection must go to the whole array or panel, and not merely to individual persons on it." 47 Am.Jur.2d Jury § 229, p. 817.

[2]Defendant at no time claimed that there was any noncompliance with § 494.250, para. 1. He claims noncompliance with § 494.250, para. 2.

of alternate petit jurors"[3] had in fact "been exhausted." The fact that the excusing took place after the bystanders had been summoned is of no moment. It was at most a "mistake or informality" which constitutes no ground for error. *State* v. *Breen,* 59 Mo. 413, 415 (1875).

Moreover, statutes pertaining to summoning jurors, including § 494.250, "have uniformly been construed as merely directory and not mandatory." *State* v. *Thompson,* 472 S.W.2d 351, 353[2, 3] (Mo. 1971). The burden of proof rested upon defendant to show a noncompliance with the statute. *McCormack* v. *McNamee,* 274 S.W.2d 272, 275 (Mo. 1955). Even if there was a lack of strict compliance with the statute, no error would result absent a showing of prejudice. *State* v. *Adams,* 497 S.W.2d 147, 153[3] (Mo. 1973); *State* v. *Hailey,* 350 Mo. 300, 165 S.W.2d 422, 423[1, 2] (1942); *State* v. *Wheeler,* 318 Mo. 1173, 2 S.W.2d 777, 778[2] (1928); *State* v. *Pettis,* 522 S.W.2d 12, 15[5, 6] (Mo.App. 1975). The latter has not been demonstrated.

Defendant's third point is that the trial court erred "in refusing to grant defendant's motion to quash the jury panel in that 14 members of said panel were selected by deputy sheriffs who were witnesses for the state and against the defendant."

A sufficient answer to this point is that it has no factual support. The record does show that the two deputies testified for the state. Defendant's brief says that they "were also involved in the summoning of the 14 bystanders who made up part of the jury panel." The transcript contains no basis for that remark.

The judgment is affirmed.

All concur.

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[3]There was no showing whether any of the four persons excused was a regular or an alternate juror.

JOHN DALE HENSON, *Movant-Appellant.* v. STATE OF MISSOURI, *Respondent.*	**No. 11004.**

Missouri Court of Appeals, Southern District,

Division Three.

April 23, 1979.

Rehearing Denied May 10, 1979.

BILLINGS, Judge.

John Dale Henson, serving a 35-year prison term for second-degree murder, filed a postconviction motion under Rule 27.26, V.A.M.R., to vacate his sentence. Following appointment of counsel, an evidentiary hearing was conducted. The trial court made detailed findings of fact and conclusions of law and denied the motion. We affirm.

Our review is limited to a determination of whether the findings, conclusions and judgment of the trial court are clearly erroneous. Rule 27.26(j); *Warren* v. *State,* 482 S.W.2d 497 (Mo. banc 1972); *Noble* v. *State,* 552 S.W.2d 267 (Mo.App. 1977). And, we accord due deference to the trial court's opportunity to judge the credibility of witnesses at the evidentiary hearing. *Nance* v. *State,* 556 S.W.2d 193 (Mo.App. 1977).

Movant's direct appeal resulted in the affirmance of his conviction by this court in *State* v. *Henson,* 552 S.W.2d 378 (Mo.App. 1977). Various grounds alleged in his motion to vacate were considered in ruling his direct appeal and cannot now be relitigated in this proceeding. *Davis* v.

State, 482 S.W.2d 468 (Mo. 1972); *Wing* v. *State,* 556 S.W.2d 226 (Mo.App. 1977). Other grounds for relief claimed by movant fall into the category of alleged trial error not rising to constitutional proportions and cannot be considered. *Coney* v. *State,* 491 S.W.2d 501 (Mo. 1973).

The primary ground alleged by movant is the oft-asserted charge levelled against trial attorneys, namely, ineffective assistance of counsel. The thrust of the evidentiary hearing revolved around this charge. The trial judge, in his filed memorandum, carefully and laboriously made findings and conclusions adverse to movant's multitude of averments on this issue. The court had before it the trial transcript, in addition to the testimony of the witnesses called by each side. The court concluded movant failed to meet his heavy burden of proof that he was denied effective assistance of counsel. *Stevens* v. *State,* 560 S.W.2d 599 (Mo.App. 1978).

We have reviewed the transcript of the evidentiary hearing which includes the trial transcript. We do not find the findings and conclusions of the able trial court to be clearly erroneous.

The judgment is affirmed.

FLANIGAN, C. J., and MAUS and GREENE, JJ., concur.